

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MARK CHURCH,

Plaintiff,

v.

AVAYA CORPORATION,

Defendant.

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No. 08 C 47

Judge Virginia M. Kendall

Mag. Judge Cox

**AVAYA INC'S MOTION
TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6)**

Defendant, Avaya Inc., improperly sued as Avaya Corporation, ("Avaya"), moves to dismiss the Complaint against it with prejudice pursuant to F.R.C.P. 12(b)(6). In support of this motion, Avaya submits a separate Memorandum of Law and states as follows:

Plaintiff's Complaint alleges one count for breach of contract in connection with sales commissions that he contends were promised to him pursuant to Avaya's sales compensation policies. Avaya's sales compensation plan specifically reserves Avaya's right to amend, change or cancel the sales compensation plan solely at its discretion. Illinois law provides that when an employer retains the right to make unilateral modifications to a sales compensation plan that a contract has not been formed between the employee and employer. Because Avaya's written policy attached to Plaintiff's Complaint demonstrates that Plaintiff did not have an employment contract with Avaya, Plaintiff's Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, Defendant, AVAYA INC., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint with prejudice.

DATED: January 9, 2008

Respectfully Submitted,

AVAYA INC.

By: /s/ David M. Holmes

David M. Holmes

Bryan J. Johnson

**WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP**

Attorneys for Defendant Avaya Inc.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on the 9th day of January, 2008, the above and foregoing was electronically filed with the Clerk of the Court using the CM/ECF system and that a true and correct copy was served on the following by the method(s) indicated:

By Regular Mail

Ken Merlino
Merlino Law Offices, P.C.
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Hoffman Estate, Illinois 60169

By Regular Mail

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/s/ David M. Holmes

David M. Holmes